FOR ARGUMENT.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Reply Brief for the Petitioner.

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Table of Contents.

Table of Authorities Cited.

Cases.

Constitutional Provisions.

MISCELLANEOUS.

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Argument.

I. RATIONALES UNDERLYING MIRANDA V. ARIZONA.

The Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), built its opinion on the foundation of the Fifth Amendment's interdiction of compulsory self-incrimination. However, the Court tendered two rationales:

> The first, by far the stronger in terms of providing constitutional legitimacy, premised the holding upon the conclusion that custodial interrogation is inherently compelling. . . . The second rationale, perhaps more persuasive in its treatment of compulsion, viewed the warnings as prophylactic safeguards to combat the "*potentiality* for compulsion."[1]

The Court has undervalued the inherent compulsion rationale because it has been determined that a confession can be voluntary in spite of a *Miranda* violation. See, e.g., *Michigan* v. *Mosley*, 423 U.S. 96 (1975). It is by default that the potentiality-for-compulsion rationale offers the Fifth Amendment link to *Miranda*.

The State concedes that there is at least some potential for compulsion in every citizen encounter with the police. "Unless *Miranda* is to apply to all such encounters, it should be applicable only when the potential for compulsion reaches some legally significant threshold level." Grano, *supra* at 44. The teaching of *Miranda* is that at least stationhouse interrogation is proscribed because of its potential for compulsion. The *Miranda* Court, as the respondent has indicated, wrote of defendants being "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." Respondent's brief at 14; *Miranda* v. *Arizona*, *supra* at 457.

> Custodial stationhouse questioning is the context in which *Miranda's* parade of horribles is most likely to be

[1] Grano, *Rhode Island* v. *Innis*: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 42 (1979) (emphasis original). The petitioner is appreciative of Professor Grano's efforts in presenting this carefully reasoned analysis which substantially furnished the content of its reply brief.

> found. Indeed, as the *Miranda* Court observed, police manuals suggest the interrogation room as the best place to deprive the suspect of every psychological advantage. At the opposite extreme, the parade of horribles is least apparent when the police engage in general on-the-scene questioning. The person questioned on-the-scene is not cut-off from the outside world or thrust into an unfamiliar, police-dominated atmosphere. While the police in such circumstances may engage in some feigned sympathy, trickery, and even hostility, they obviously do not have the opportunity to employ a menacing interrogation process in which patience and perseverance will eventually prevail. Moreover, street questioning, unlike stationhouse questioning, rarely is conducted by a skilled interrogator familiar with police manual techniques for undermining resistance. Grano, *supra* at 44.

However, as Professor Kamisar has noted, a no-pressure situation is not mandated by *Miranda*.[2]

The crucial question in *Innis* is where to locate the case on the scale of potential for compulsion. Thomas Innis was not apprehended and thrust into a police vehicle "where his attending officers wasted no time in inducing an inculpatory statement," as the respondent has characterized the facts. Respondent's brief at 38. Rather, Innis was informed of his rights, was not held incommunicado, and was neither threatened nor placed in an environment coercive beyond that inherent in any arrest. Certainly, any stress experienced by the defendant during his short ride in the wagon was greater than that which would be experienced during on the scene

[2] Kamisar, *Brewer* v. *Williams*, *Massiah*, *and Miranda*: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L. J. 1 (1978).

questioning. The facts indicate that Innis was seated for a few minutes next to Patrolman Gleckman, who had been issued instructions not to question, intimidate, or coerce him in any manner (A. 22-23, 38). While the defendant was arrested and in custody under *Miranda*, he was not subjugated to the will of experienced interrogators nor was what occurred the type of relentless fear-producing situation which the Court found to be inherently coercive in *Miranda*. While some police chicanery might have been possible in the minutes when the defendant was seated next to the patrolman, the record does not support such a contention. The remarks in question were not made with the intent to elicit a response from Innis. Neither the Fifth Amendment nor *Miranda* ". . . requires the police, upon arresting a suspect, to assume the role of contemplative monks at all times while they are in the suspect's company." *State* v. *Innis*, ____ R.I. ____, 391 A. 2d 1158, 1167 (1978) (Kelleher & Joslin, JJ., dissenting).

The respondent has conceded that *Miranda* shields defendants not from the pressure of custody but from the pressure of custodial interrogation. Respondent's brief at 14. Since custody alone does not produce enough stress to trigger *Miranda's* prerequisites, interrogation must "consist of something more than verbal or nonverbal conduct designed or likely to elicit a response." Grano, *supra* at 46. The record does not support the respondent's argument that Innis was compelled to incriminate himself by leading the police to the gun. This Court has asserted that "admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States* v. *Washington*, 431 U.S. 181, 187 (1977).

> All agree that after defendant requested an attorney, no one spoke to him, questioned him, or directed their remarks to him in any way. Statements volunteered by a suspect have never been thought to create constitutional problems. *State* v. *Innis*, *supra* at 1171 (Kelleher & Joslin, JJ., dissenting).
>
> The question, then, is whether the need for prophylactic fifth amendment protections in this context is great enough to justify the cost of discarding a perfectly voluntary statement. Had Innis [simply] blurted out that he wanted to return to the arrest scene to locate the gun, a *Miranda* issue would not even be present. The application of *Miranda* thus turns solely on the legal significance of the officer's remarks. Even if the "handicapped children" remarks can fairly be viewed as a form of questioning, their significance for *Miranda* purposes should depend upon the overall potential for compelling interrogation. Grano, *supra* at 47.

The State respectfully submits that the conversation which occurred in the police vehicle between the patrolmen and Innis' subsequent volunteered statement are not tantamount to the type of interrogation proscribed in *Miranda*.

II. Miranda's Per Se Exclusionary Rule Should Not Be Extended.

Even if the State were to concede that Innis was interrogated, the shotgun should not be excluded from evidence. The facts in the case at bar establish that the defendant voluntarily, knowingly, and intentionally relinquished his known rights. See *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). At this critical waiver stage, *Innis* loses all resemblance to *Brewer* v. *Williams*, 430 U.S. 387 (1977), contrary to the argument advanced by the respondent. Respondent's brief at 21-24. In

Williams, there was no "break in the action" after Captain Leaming delivered his "Christian burial speech" and before the defendant led him to the child's body. The Court was careful to note that there was no evidence in the case that Williams voluntarily waived his rights, except for the fact that statements eventually were obtained. *Id.* at 41.

> When defendant [Innis] was arrested unarmed at 4:30 a.m., the logical inference was that he had secreted the shotgun nearby. The defendant was arrested about a block away from the Pleasant View School, and within a matter of a few hours the children would be making their way towards this institution. When defendant requested an attorney, all questioning ceased. And now defendant had returned to the scene and indicated a willingness to pinpoint the location of the dangerous weapon. Under the circumstances, what should Captain Leyden have done? [The State submits that] . . . he did the only thing he reasonably could have done. The defendant was taken out of the police car and for the fourth time that evening was given the full panoply of constitutional protection due him. The captain then asked defendant if he understood these rights and received an affirmative answer. When defendant insisted on locating the shotgun, Captain Leyden directed that the search for the weapon begin. *State* v. *Innis*, *supra* at 1171-1172 (Kelleher & Joslin, JJ., dissenting).

The State submits that Innis voluntarily and intelligently waived his right to counsel. *Miranda* held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so.

> That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. *North Carolina* v. *Butler*, ___ U.S. ___, 60 L. Ed. 2d 286, 292 (1979).

This Court indicated in *Butler* that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to counsel guaranteed by *Miranda*. Mr. Justice Stewart opined that "[e]ven when the right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,'" *id.* at 293, and relied on *Johnson* v. *Zerbst*, *supra*, for support. The Court rejected the wooden *per se* rule applied by the North Carolina court and saw no reason to discard the totality-of-circumstances standard mandated by the requirements of federal organic law.[3]

In *Fare* v. *Michael C.*, ___ U.S. ___, 61 L. Ed. 2d 197, 212 (1979), this Court reiterated that the totality-of-circumstances test applies once *Miranda's* literal commands have been met. Further, "[t]his totality of the circumstances ap-

[3] See also *Fare* v. *Michael C.*, ___ U.S. ___, 61 L. Ed. 2d 197 (1979), where the Court again demonstrated its reluctance to extend exclusionary rules carried over from the Fourth Amendment to the *per se* rule which enforces *Miranda*. In *Fare*, the Court recognized the lawyer's essential role in the criminal justice system, but reversed a California Supreme Court judgment that would have extended *Miranda's per se* exclusionary rule.

proach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved." *Ibid.*

> The totality approach permits — indeed, it mandates — inquiry into all the circumstances surrounding the interrogation. This includes evaluation of . . . [the defendant's] age, experience, education, background, and intelligence, and into [*sic*] whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. *Ibid.*

The respondent claims that Innis did not waive his rights and relies on a rigid *per se* analysis to support his argument. The record does not support such a conclusion under the totality-of-circumstances approach. As noted, the police took care to inform the respondent of his rights and to ensure that he understood them. The officers neither intimidated nor threatened Innis in any way. Their conduct was free from the parade of horribles that concerned the Court in *Miranda*. When Innis requested the assistance of counsel, the police did what they should have done under the circumstances; no one spoke to him, questioned him, or directed his conversation to him in any way. The State submits that statements *volunteered* by the suspect do not create constitutional problems. Further, the record indicates that the police did not attempt to exploit Innis' offer to lead them to the gun. Rather, he was taken out of the police car and again read the *Miranda* warnings on the street to ensure that he understood the consequences of his deliberate comments. Innis advised Captain Leyden that he understood what he was doing. It is clear that he spoke and acted freely, with full comprehension of his constitutional rights. If the Court were to hold otherwise, the worst fears of the *Brewer* dissenters would be realized and the result would be one which ". . . ought to be intolerable in any society which purports to call itself an organized society." *Brewer* v. *Williams*, *supra* at 415 (Burger, C.J., dissenting).

Conclusion.

For the reasons stated in its brief and in this reply brief, the State respectfully requests this Court to reverse the judgment of the Supreme Court of Rhode Island.

Respectfully submitted,

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